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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SEAN MICHAELS et al., Plaintiffs and Appellants, v. MILLENNIUM PENSION SERVICES, INC., Defendant and Respondent.	B262896 (Los Angeles County Super. Ct. No. EC062043)

APPEAL from a judgment of the Superior Court of Los Angeles County, Donna Fields Goldstein, Judge. Affirmed in part; reversed and remanded in part.

Beitchman & Zekian, David P. Beitchman and Zina Yu for Plaintiffs and Appellants.

Gordon & Rees, Matthew G. Kleiner and Jordan S. Derringer for Defendant and Respondent.

Plaintiffs and appellants Sean Michaels and Daniel B. Cooper sued defendant and respondent Millennium Pension Services, Inc. (Millennium), for breach of contract and for professional negligence. The trial court sustained Millennium's demurrer without leave to amend, on the ground, among others, appellants lacked standing to sue, because they were neither signatories to the contract nor third party beneficiaries. On appeal, appellants concede that the demurrer might have had merit, but they argue that the court nonetheless abused its discretion by not allowing them leave to amend to add as plaintiff Life Equity Partners, Inc. (Life Equity), the party to the contract. Because we agree, we reverse and remand to allow appellants to amend their pleading as to the breach of contract cause of action. But because appellants have failed to address the merits of the demurrer as to the second cause of action for professional negligence, we hold that the demurrer was properly sustained without leave to amend as to it.

BACKGROUND

Michaels and Cooper co-owned Life Equity Partners, a company that offered a pension-benefit program to its employees. Millennium is a consulting firm that customizes pension benefit plans for organizations and offers continuous and ongoing administration of those plans based on a review of its clients' census and financial information. Millennium's functions include "actuarial services, benefit calculations, regulatory services, and administrative services." In December 2008, Life Equity and Millennium entered into a Service Agreement under which Millennium would provide "certain record-keeping and consulting services" "to assist [Life Equity] with responsibilities under the provisions of" Life Equity's pension plan, the Internal Revenue Code and ERISA. Life Equity dissolved on February 1, 2012, and no longer functions as a corporate entity.

In 2014, Michaels and Cooper, as individuals, filed their second amended complaint against Millennium, which alleged two causes of action, one for breach of

contract and the second for professional negligence.[1] The pleading alleged that Millennium used inaccurate normal retirement age figures and contribution amounts, used an inapplicable mortality index, failed to use " 'actuarial equivalence,' " and that there was "dubiousness" in offset figures used by Millennium.

Millennium demurred to the pleading on the ground that plaintiffs lacked standing to sue for breach of contract because Michaels and Cooper were not third party beneficiaries of the Service Agreement, and, as to both causes of action, failed to state a cause of action. Plaintiffs responded that they had standing to pursue their claims as intended third party beneficiaries.

On January 21, 2015, the trial court sustained Millennium's demurrer without leave to amend. As to the first cause of action for breach of contract, the court found that Michaels and Cooper were not third party beneficiaries and therefore had no standing to sue. As to the second cause of action for professional negligence, the court found that plaintiffs alleged no duty independent from the contract arising from principles of tort law. Judgment was therefore entered in Millennium's favor.

DISCUSSION

Michaels and Cooper do not contend that the demurrer was improperly sustained.[2] They argue that it should not have been sustained *without leave to amend*, because they can cure any defect by naming Life Equity, the dissolved corporation, as a plaintiff. We

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[1] Plaintiffs apparently filed a first amended complaint as a matter of right, and Millennium demurred to it.

[2] It is unclear whether appellants intended to challenge on appeal the trial court's finding they were not third party beneficiaries. In their opening brief, they refer to the issue but make clear that their appeal rests on the argument that Life Equity is the proper party to pursue the action. In their reply brief, appellants repeatedly state that whether Michaels and Cooper have standing and can "state a cause of action is largely beside the point. Michaels and Cooper do not contend here on appeal that *they* themselves have standing to state a cause of action—although they acknowledge that *maybe* they *were* right and that *maybe* they *do* . . . rather, Michaels and Cooper contend that *Life Equity* indeed can state a cause of action . . . ." We therefore do not address whether Michaels and Cooper have standing as third party beneficiaries.

agree that appellants have demonstrated they can amend the pleading to state the first cause of action for breach of contract, but we disagree that a similar showing has been made as to the second cause of action for professional negligence.

When reviewing a judgment entered following the sustaining of a demurrer without leave to amend, our de novo review requires us to assume the truth of the factual allegations of the complaint, giving the complaint a reasonable interpretation and reading the complaint as a whole and its parts in their context. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) And when a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm." (*Ibid.*; see also Code Civ. Proc., § 452; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1621.) "The issue of leave to amend is always open on appeal, even if not raised by the plaintiff." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 746; see also Code Civ. Proc., § 472c; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 550.)

Here, Michaels and Cooper can amend their complaint by naming Life Equity as a plaintiff. That Life Equity dissolved in 2012 is no bar to its standing. Corporations Code section 2010 provides in relevant part: "(a) A corporation which is dissolved nevertheless continues to exist for the purpose of winding up its affairs, *prosecuting and defending actions by or against it* and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof."[3] (Italics added; see also *Peñasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, 1183;

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[3] Corporations Code section 2010 further provides: "(b) No action or proceeding to which a corporation is a party abates by the dissolution of the corporation or by reason of proceedings for winding up and dissolution thereof. [¶] (c) Any assets inadvertently or otherwise omitted from the winding up continue in the dissolved corporation for the benefit of the persons entitled thereto upon dissolution of the corporation and on realization shall be distributed accordingly."

Favila v. Katten Muchin Rosenman LLP (2010) 188 Cal.App.4th 189, 213 [actions that board and officers of dissolved corporation may take after dissolution include bringing an action in corporation's name].) After dissolution, a corporation, "although no longer permitted to do business as a going concern, continues to exist for purposes of winding up its affairs and, in particular, for discharging obligations and defending lawsuits." (*Peñasquitos, Inc.*, at p. 1183.) "Thus, a corporation's dissolution is best understood not as its death, but merely as its retirement from active business." (*Id.* at p. 1190.)

Here, the lawsuit against Millennium seeks to recover principal invested in Life Equity's pension plan. The lawsuit therefore is best characterized as one brought to wind up its affairs rather than as a continuance of its business. Millennium's failure to respond to this issue operates as a tacit concession of its merit. Indeed, Millennium expressly conceded that Life Equity has standing when Millennium stated, in its demurrer, "Again, although Plaintiffs allege that [Life Equity] was dissolved on February 1, 2012, [Life Equity] nevertheless continues to exist to prosecute and defend actions by or against it. . . . It is a mystery why Plaintiffs continue to pursue this action as third party beneficiaries when [Life Equity] would have standing to bring the action."

Millennium, having conceded that Life Equity has standing, cannot now argue to the contrary. Millennium therefore responds to the issue of Life Equity's standing with two arguments: the issue is waived and the statute of limitations bars any amendment. Millennium's waiver argument rests on plaintiffs' failure in the trial court to request leave to amend to name Life Equity as a plaintiff. This is of no moment. So long as the facts and the law support the request, a plaintiff may request leave to amend, even if the first time they do so is on appeal. (Code Civ. Proc., § 472c; *City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 746.)

As to the four-years limitations period for a breach of contract action, Millennium asserts it ran on or about February 10, 2015, and therefore any action by Life Equity is time-barred. We need not decide when the limitations period ran, because Life Equity's amended pleading would relate back to the original one. The relation-back doctrine

deems a later-filed pleading as having been filed at the time of the earlier complaint, thus avoiding the statute of limitations as a bar, if the amended complaint (1) rests on the same general set of facts, (2) involves the same injury, and (3) refers to the same instrumentality (cause) as the initial complaint. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409; *San Diego Gas & Electric Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1549.) Although an "amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater liability against the defendants," that is not the case here. (*San Diego Gas & Electric Co.*, at p. 1550; see also *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 20.) By naming Life Equity as plaintiff, plaintiffs seek to enforce the same right and impose the same liability on Millennium as originally alleged. Stated otherwise, Michaels and Cooper are naming the real party in interest, Life Equity, as plaintiff. "[C]ourts have permitted plaintiffs who have been determined to lack standing, or who have lost standing after the complaint was filed, to substitute as plaintiffs the true real parties in interest." (*Branick v. Downey Savings & Loan Assn.* (2006) 39 Cal.4th 235, 243; see *Klopstock*, at p. 21; *Curtis v. Nye & Nissen* (1927) 86 Cal.App. 507, 512-513 [because corporation was the party having the right to bring action, individual plaintiff permitted to add corporation as plaintiff].) We therefore conclude that the pleading may be amended to name Life Equity as a plaintiff.

Our conclusion that plaintiffs should be given leave to amend to name Life Equity as a plaintiff resolves the appeal as to the breach of contract cause of action but not necessarily as to the professional negligence cause of action. The trial court sustained the demurrer to that cause of action because, although it was alleged in the guise of a tort, it sounded in contract. Notably, plaintiffs do not address this argument in their briefs, and we construe this failure as a waiver. (See, e.g., *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [contentions waived when there is failure to support them with reasoned argument and citations to authority].) In any event, the second cause of action simply reincorporated the breach of contract allegations, merely adding, for

example, that Millennium owed plaintiffs a "duty to exercise reasonable care and skill to competently perform actuarial and administrative services." The second cause of action thus stated no duty independent of the Service Agreement. (See generally *Erlich v. Menezes* (1999) 21 Cal.4th 543, 551 [" 'contractual obligation may create a legal duty and the breach of that duty may support an action in tort.' This is true; however, conduct amounting to a breach of contract becomes tortious only when it also violates a duty independent of the contract arising from principles of tort law. [Citation.] ' " 'An omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty.' " ' [Citations.]"].) Therefore, whether alleged by Michaels and Cooper or by Life Equity, no cause of action for professional negligence was stated, and the demurrer was properly sustained without leave to amend.

DISPOSITION

The judgment is affirmed as to the second cause of action for professional negligence and reversed and remanded as to the first cause of action for breach of contract. Parties are to bear their own costs on appeal.

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ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.